

help in their construction. It is not immaterial to note that the devise to the son in clause 6 begins in the form of an absolute gift and that the sentence which occasions the difficulty follows in the form of a separate clause, which, if the appellant's view is correct, must be treated, though it certainly is not wholly free from ambiguity, as cutting down the prior devise. Again, the legacy to the son is to be deposited in a bank until the son attains the age of 25 years and this may be thought to suggest that the object of the testator with regard to his son was not to prevent him having any estate in the real property unless and until he should attain the age of 25 years, but rather to postpone his enjoyment and if possible to prevent him from misapplying the property [123] before he was 25. Further, some weight may properly be attached to the consideration that if the appellant is correct and devise is contingent, the rents and profits of the properties in question until the son attained the age of 25 would pass as on an intestacy, with the result that neither of the children described by the testator as his son and daughter would in any circumstances derive any benefit from such rents and profits, a singular result having regard to the fact that the testator has actually directed his trustees to let the shop attached to 39 Massey Street, premises, at such rent and subject to such covenants as they shall think fit. On the other hand no weight can properly be attached to the direction that the cousin Emanuel shall occupy and reside in the house at 39 Massey Street, since this appears to be merely a personal right of occupation and not the gift of an estate. On a consideration of the whole of the will and of the circumstances in which it was made, and applying the rule or principle above referred to in relation to vesting, their Lordships are of opinion that the true construction of the words "shall take effect" is that they relate to the devise taking effect in possession, and are not intended to impose a condition precedent on the devise contained in clause 6 of the will. The devise must therefore be construed as besting at the death of the testator subject to divestment if the respondent should fail to attain the age of 25. They will accordingly humbly advise His Majesty to affirm the judgment appealed from. The appellant must pay to the respondent his costs of this appeal.

Appeal dismissed.

Solicitors: *Benham, Synnot & Wade; Stoneham & Sons.*

ADIB EL HINNAWI v. YACoub FAHMI ABU EL HUDA EL FARUQ

[P.C. (Lords Atkin, Alness and Maugham)]

February 27, 1936]

[Privy Council Appeal No. 101 of 1933]

Practice — Plea not urged in lower Courts to an issue — Plea held not to be affirmable on appeal Privy Council.

Promissory note — Consideration — Inadequacy of — Insufficiency of plea.

Where it was established that consideration was given for a promissory note, the inadequacy of the consideration afforded no relevant answer to a demand made upon it.

Where it was open to the appellant to have urged a plea of undue influence in the Courts below to an issue, that is to say, to have claimed and obtained a judicial decision upon it, but he omitted to do so;

Held: that it was impossible for the Privy Council to have set aside the judgment appealed against, and to affirm such plea.

PRIVY COUNCIL.—Appeal from the Supreme Court of Palestine.

John Morris and Arthian Davies for the appellant.

B. B. Stenham and Frank Whitworth for the respondent.

The judgment of the Board was delivered by—

Lord Alness: This is an appeal from a judgment of the Supreme Court of Palestine, dated 5th April, 1932, reversing a judgment of the District Court of Jaffa, dated 9th November, 1931, and entering judgment for the respondent against the appellant for the equivalent in Palestine currency of £E4,000, with interest and costs. The action out of which the appeal arises was begun on 7th February, 1928, in the District Court of Jaffa by the respondent who was the widower of one Fatmeh Mohamad el Hinnawi, against the appellant, as the heir of Fatmeh, claiming payment of the said sum of £E4,000, which was alleged to be due to the respondent upon a promissory note, dated 7th November, 1926, and interest. The defence offered by the appellant, called his "statement of reply," was in substance (1) that the promissory note was not executed by the said Fatmeh, and (2) that there was no consideration for the note. On 18th March, 1928, the action was heard before the District Court of Jaffa, when it was dismissed on the grounds (1) that the promissory note was invalid, and (2) that in law the respondent was not entitled to establish that the deceased had made the note. On 21st May, 1928, the respondent appealed from the said judgment to the Supreme Court of Palestine. On 5th February, 1929, that Court unanimously allowed the appeal, and set aside the judgment of the District Court. They remitted the action to the District Court for comparison of the finger-prints on the promissory note with authenticated finger-prints of the deceased, and for hearing evidence with regard to the making of the note; and they further ordered that, in the event of the District Court being satisfied that the note was duly executed, the question whether consideration was given therefor or not should be taken into account and a fresh judgment given.

On 31st March, 1929, the case again came on for hearing before the District Court of Jaffa, when evidence and argument were duly heard. On 25th July, 1929, the District Court found in fact that the finger-print on the note was that of deceased Fatmeh, and they entered judgment for the respondent against the appellant for £E4,000 and costs. The District Court, however, [124] omitted to deal with the question of whether consideration had been given for the note, as in the circumstances they were directed to do. On 3rd February, 1930, the appellant appealed from that judgment to the Supreme Court of Palestine. He pleaded *inter alia* that no consideration for the promissory note had been given, and pointed out

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that no decision on that matter had been given by the District Court. On 26th May, 1931, the appeal was heard by the Supreme Court of Palestine when they remitted the case to the District Court of Jaffa, in order that the question whether consideration had been given for the promissory note might be considered and after evidence being given, if that should be thought necessary, be determined. The District Court heard evidence on the matter and on 9th November, 1931, they delivered judgment. They held that there was no real consideration for the promissory note, and being of opinion that the services rendered to the deceased by the respondent were not equivalent to the value of the note, they dismissed the action.

The respondent appealed to the Court of Appeal, and on 5th April, 1932, that Court allowed the appeal, set aside the judgment of the District Court, and entered judgment in favour of the respondent, with costs. The Court of Appeal held that the burden was on the appellant to show that no consideration had been given by the respondent for the note, and that that defence had not been made out. They further held that it was not for the Court of first instance to enquire into the adequacy of the consideration for the note, but to consider whether or not there had or had not been any consideration given. By orders dated 26th May, 1932 and 17th September, 1932, the appellant obtained leave to appeal to His Majesty in Council and the appeal has now been heard. The appellant's counsel argued (1) that there was no consideration given for the promissory note, and (2) that the promissory note was obtained by undue influence on the part of the respondent, particularly in view of the relationship of husband and wife which subsisted at the date when the note was made between the respondent and the deceased Fatmeh. With regard to the first ground of appeal, their Lordships are satisfied that consideration was given for the promissory note and that the judgment of the Court of Appeal on that point is unassailable. They are further of opinion that having regard to the terms of the promissory note the alleged inadequacy of consideration affords no relevant answer to a demand made upon it.

With regards to the plea of undue influence their Lordships are of opinion that inasmuch as the plea was not pressed in the Courts below, with the result that there is neither specific evidence nor any direct finding with regard to it, they are absolved from the necessity of dealing with the matter in detail now. It is manifest from the proceedings that it was open to the appellant to have urged the plea in the Courts below to an issue, in other words to have claimed and obtained a judicial decision upon it. The appellant omitted to do this and it is therefore quite impossible in their Lordships' opinion on the materials available to them to set aside the judgment appealed against and to affirm the plea of undue influence. Their Lordships are further of opinion that having regard to the sum at stake between the parties and to the protracted character of the litigation regarding it which ensued, it would not be reasonable or proper for the Board now to make a remit for enquiry into

A the question of undue influence as they were invited by the appellant to do and they must accordingly decline to take that course. In the circumstances recited, the appeal fails, and the appellant must pay the costs of it. Their Lordships will humbly advise His Majesty accordingly.

Appeal dismissed.

B Solicitors: *Herbert Oppenheimer Nathan Vandyke & Mackay; Samuel Sebba.*

[125] STRAITS SETTLEMENTS REPORTS

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PUBLISHED BY AUTHORITY

G. H. JOSHI v. UNITED INDIAN ASSOCIATION

[O.C.J. (Gordon Smith J.) March 2, 1936]

[Penang Suit No. 29 of 1936]

Club law — Threatened expulsion of member — Rule of association purporting to prohibit recourse to court of law.

D The plaintiff was a member of the defendant association. That association had a rule which provided that no member should have recourse to a court of law in matters concerning the association. The plaintiff required the committee of the association to furnish him with information concerning what appeared to be irregularities in administration and as he did not get satisfaction he threatened to seek the assistance of the court. Thereupon the committee of the association threatened to expel the plaintiff from the association. The plaintiff thereupon commenced proceedings claiming an injunction to restrain such action.

Held: that even though there was provision in the rules prohibiting an appeal to courts of law, if an action was indispensable, the jurisdiction of the court could not be ousted by the rules because justice could not be done without the jurisdiction.

F MOTION for interim injunction.

Conaghan for the plaintiff.

Ross and Tah Ah Tah for the defendants.

The facts and arguments are sufficiently set out in the judgment.

Cur. Adv. Vult.

G Gordon Smith J.: The writ of summons in this action which was issued on the 30th January, 1936, claims an injunction restraining the defendant association, its committee, members, servants and agents from expelling the plaintiff from the association, from excluding him from the association premises, and from preventing him from exercising his rights and privileges as a member of the said association. The plaintiff further claims an injunction restraining the defendant association, as above, from calling upon the plaintiff to resign from the defendant association before the fourth day of February, 1936.

I On the 4th February a motion was filed for an interim injunction pending the trial of the suit, in the terms endorsed on the writ, on the grounds:—

i. that rule 11 was 'ultra vires' and void as against public policy in that it endeavoured to oust the jurisdiction of the Court;

ii. that the notices dated respectively the 4th and the 11th of January, 1936, did not contain the charges of the alleged misconduct with sufficient particulars;